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No. 09-265

Supreme Court, U.S.
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In The
Supreme Court of the United States

INDEPENDENCE INSTITUTE,

Petitioner,

v.

BERNIE BUESCHER, SECRETARY OF STATE, STATE OF COLORADO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Colorado

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION.

On October 20, 2009, this Court, with one Justice dissenting, issued a stay in *Doe v. Reed*, No. 09A356 (Oct. 20, 2009), and preserved the anonymity of petition signatories until this Court determines whether to accept the case for review. Petitioner Independence Institute's petition for certiorari in the instant case raises First Amendment questions that are analytically similar to those at issue in *Reed*, but which will not be decided in *Reed* if this Court accepts that case. The two cases focus on different stages of a ballot measure's life cycle. *Reed* raises the question of whether signatories to a petition to place an issue on the ballot have a right to anonymous speech and association and whether the disclosure of their identities violates those rights. The instant case raises the question of whether those who contribute to a group that supports or opposes a measure that has reached the ballot have a right to maintain their anonymity and whether disclosing their identities violates their rights to speech and association. The issues are thus similar, but arise at different stages of the ballot measure campaign process, where both the governmental interests at stake and the nature of the speaker's interest in anonymity are different. A decision for the plaintiffs in *Reed* would thus not resolve the issue presented by this case. In other words, if this Court addresses the issue presented by *Reed*, it would leave unsettled the issue of the constitutionality of disclosure after a measure has qualified for the ballot.

Despite Respondent's arguments in opposition, this case presents a justiciable controversy and raises issues that are recurring, of national import, and should be settled by this Court. The Court should grant certiorari both here and in *Reed* to set clear standards for the protection of the rights to speech and association at all stages of the public's consideration of ballot measure questions.

II. THIS CASE RAISES ISSUES THAT ARE SIMILAR TO *DOE v. REED* AND EQUALLY IMPORTANT, BUT WHICH WILL NOT BE ADDRESSED IF THIS COURT ACCEPTS THAT CASE FOR REVIEW.

On October 20, 2009, this Court issued its stay in *Reed*, a case concerning the constitutionality of disclosing the names and addresses of signatories to a petition to place a referendum on the Washington State ballot concerning that state's domestic partnership law. *See Doe v. Reed*, Nos. 09-35818, 09-35826, 09-35863, 2009 WL 3401297, at *3 (9th Cir. Oct. 22, 2009) (discussing procedural history). The plaintiffs sought a temporary restraining order from the district court, which that court granted. *Id.* The Ninth Circuit reversed and lifted the injunction. *Id.* The plaintiffs sought a stay with this Court, which Justice Kennedy, acting as Circuit Justice, granted and referred to the full Court, which concurred. *Doe v. Reed*, No. 09A356 (Oct. 20, 2009).

Both *Reed* and the instant case raise an issue that is of fundamental importance but that this Court's prior rulings do not answer: whether a state has a sufficiently compelling interest to justify requiring individuals who sign petitions supporting the placement of an issue on the ballot, or who contribute money to a group supporting or opposing an issue once it is placed on the ballot, to disclose their identities – including, in some cases, their addresses and even the names and addresses of their employer. This Court has held that individuals have a First Amendment right to anonymous speech, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[the] decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment"); it has held that speech about ballot issues is core political speech at both the petition stage, *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("the circulation of a petition involves . . . 'core political speech'"), and at the elections stage, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (holding that speech concerning a ballot measure "is intimately related to the process of governing" and therefore warrants strict scrutiny); it has held that individuals have a right to associate for the purpose of promoting the passage or defeat of a ballot issue, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) ("There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them."); and it has held that

disclosure of group affiliation can severely burden and chill the right of political association, *NAACP v. Alabama*, 357 U.S. 449, 462 ("compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [direct] governmental action . . ."), *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 97 (1982) (extending *NAACP* to disclosure of campaign disbursements, which could lead to harassment in the case of unpopular causes). But this Court has not decided whether these precedents permit states to require individuals who sign petitions to place an issue on the ballot or who financially support or oppose that issue once it is on the ballot to disclose their identities, addresses, and sometimes even their employers.

The considerations that led this Court to issue the stay in *Reed* should lead it to grant certiorari in this case. Moreover, this case presents additional considerations regarding the constitutional protection of anonymous speech and association that are not present in *Reed* – considerations that militate in favor of protecting these rights. Specifically, the citizen's interest in anonymity is stronger regarding contributions to a ballot measure committee than in signing a petition to place a measure on the ballot. A contribution demonstrates the citizen's support of or opposition to the substance of the measure, while a signature on the petition may simply mean that the citizen wishes the public to vote on that issue. *See Doe v. Reed*, Nos. 09-35818, 09-35826, 09-35863, 2009 WL 3401297, at *6 (9th Cir. Oct. 22, 2009). ("Referendum petition signers, however, cannot be considered

'generally' in favor of a particular ballot issue."). *See also McIntyre*, 514 U.S. at 355 (noting that laws requiring disclosure of the "contents of [an individual's] thoughts" are "particularly intrusive"). In addition, the government's interest in disclosure is different at the signature-gathering stage and the time of the actual election. In *Reed*, the government argued that disclosure is necessary to allow the public to "independently examine whether the State acted properly in determining whether a referendum measure qualified for the ballot." *Doe v. Reed*, No. C09-5456, 2009 WL 2971761, at *9 (W.D. Wash. Sept. 10, 2009). No such interest exists regarding disclosure of those contributing to a measure that has already qualified for the ballot, as was the case here.

A Circuit Justice may grant an application for a stay of a decision of a Court of Appeals if there is (i) a likelihood of irreparable injury that, assuming the correctness of the applicant's position, would result were a stay not issued, (ii) a reasonable probability that the Court will grant certiorari, and (iii) a fair prospect that the applicant will ultimately prevail on the merits. *Planned Parenthood of Se. Pennsylvania v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers). Thus, in *Reed*, this Court has indicated that the disclosure of political activity in the signature-gathering stage raises an issue about which there is a reasonable probability this Court may grant certiorari and that there is a fair prospect that those seeking to keep their political activity anonymous will ultimately prevail on the merits. The instant case, on the other hand, presents similar substantive issues at

a significantly different stage of the electoral process. Thus, certiorari is warranted in both cases so that this Court may clearly establish whether, or to what extent, disclosure of political activity is constitutionally permissible in the ballot measure context across the entire life of a campaign.

The lower courts have struggled with this issue, but have generally concluded that such disclosure is permissible. In so doing, they have routinely blurred together candidate and ballot measure elections, despite the fact that "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *Bellotti*, 435 U.S. at 790. *See, e.g., Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) (noting a single government "interest in providing the electorate with information related to election and ballot issues"); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003) (concluding that the same interests control in both types of campaigns); *State v. Marshall*, 633 P.2d 227, 235-36 (Alaska 1981) (no mention of differences between candidate and initiative campaigns). This blurring overlooks the fact that voters on a ballot measure need not worry about "where political campaign money comes from and how it is spent by the candidate," where "to place each candidate in the political spectrum," or "to [which] interests a candidate is likely to be most responsive." *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976). A ballot measure cannot be corrupted; its effect cannot be changed or manipulated

by donor money. The rationale for disclosure in candidate campaigns thus has limited, if any, utility in ballot measure campaigns.

III. A JUSTICIABLE CONTROVERSY EXISTS HERE BECAUSE THE VAGUENESS OF COLORADO'S LAW PLACES THE INSTITUTE UNDER THE CONSTANT THREAT THAT ITS SPEECH ABOUT BALLOT ISSUES WILL MAKE IT AN ISSUE COMMITTEE.

Respondent contends that Petitioner's claims are nonjusticiable by assuming away Petitioner's two main arguments about the statute: first, that the law is vague, and second, that the solution to this vagueness problem cannot be to force Petitioner to litigate the question of whether it is an issue committee each time it wishes to speak about a ballot measure. As a result, Respondent is left with a circular argument: Respondent simply asserts that the law is not vague because an Administrative Law Judge was able to determine that the Institute was not an issue committee, and, because of this determination, the Institute cannot be injured going forward. Respondent's argument is illogical, wrong on the facts, and wrong on the law.

Respondent asserts, without any support, that "[i]t is undisputed that the Institute is not an issue committee" and therefore does not fall within Colorado's Fair Campaign Practices Act (FCPA). Opp. 12.

The basis for Respondent's conclusion is the Administrative Law Judge's (ALJ) decision regarding Petitioner's speech concerning Referenda C and D in 2005. Opp. 7. That decision does not bear the weight Respondent places on it. It applies only to one complaint from one citizen. Under Colorado law, an administrative law judge's decision binds only the particular parties to the proceeding. *See Dee Enters. v. Indus. Claim Appeals Office*, 89 P.3d 430, 434 (Colo. Ct. App. 2003). The ALJ's decision would not even have precluded another complaint against Petitioner brought by a different citizen during the Referenda C and D campaign, let alone complaints brought against it for its speech in subsequent elections. Each complaint claiming Petitioner is an issue committee would trigger a new administrative hearing in which the decision of November 4, 2005 would have no weight at all. Thus, Respondent's claim that the ALJ's decision "conclusively" places Petitioner outside the definition of an issue committee for all time is simply wrong. Opp. 12.

Moreover, even if the ALJ's decision somehow determined the scope of the statute and its application in perpetuity, the reasoning employed by the ALJ – and adopted by the Colorado Court of Appeals – provides no guidance as to when and under what circumstances speakers become issue committees during elections. For example, in interpreting "major purpose," the ALJ considered the number of topical issues Petitioner studies, the extent to which

Referenda C and D dominated any of Petitioner's "policy centers," whether Petitioner's mission changes with each election, the amount of time Petitioner's staff dedicated to the referenda, and the portion of Petitioner's budget expended on Referenda C and D. App. 65-68. However, neither the ALJ nor the Colorado Court of Appeals was able to give any indication of the weight or importance speakers are to give to each term in this definitional labyrinth or reveal how these standards are to be applied in the future.

Respondent likewise dismisses the possibility that Petitioner could ever be an issue committee because it "does not actually 'support or oppose' any ballot issue." Opp. 13. This conclusion appears to rest on the fact that Petitioner did not urge a "yes" or "no" vote on the referenda. Opp. 12. Here, Respondent makes yet another unsupported assumption: that the phrase "support or oppose" in the statute means express advocacy. Opp. 29. Not surprisingly, Respondent does not cite to a single Colorado case – or even a regulation or advisory opinion – that indicates "support or oppose" means express advocacy. While "support or oppose" may, in some circumstances and in some statutes, constitute express advocacy, no court has held that that is true as a universal matter of constitutional law, statutory interpretation, or Colorado law. *Cf. North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 283 (4th Cir. 2008) (striking down as unconstitutionally vague North Carolina's attempt to define "support or oppose" to mean the functional equivalent of express advocacy by

reference to the communication's "essential nature"). Thus, Respondent's latest attempt to rewrite the statute to narrow it to only words of express advocacy fails.[1]

The net result of Respondent's position is that Petitioner can only guess when speech criticizing or extolling the virtues of certain ballot measures in the future will render it an issue committee. The only definitive answer will come after expensive and time-consuming litigation. *Cf. Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (rejecting an intent standard for express advocacy because it would "typically lead to a burdensome, expert-driven inquiry with indeterminate result," which "will unquestionably chill a substantial amount of political speech"). In that regard, Respondent ignores the fact his office does not control when the FCPA is enforced against speakers. As this case illustrates, politically-motivated complainants may initiate administrative proceedings against speakers whom they believe to have violated the law. COLO.

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[1] Moreover, incorporating an "express advocacy" test into Colorado's law makes no sense. This Court created the "express advocacy" test in *Buckley* to limit campaign finance regulations to apply to only those actions that are "unambiguously related to the campaign of a particular federal candidate," so that such regulations did not reach "issue discussion[s]." *Buckley*, 424 U.S. at 79-80. But advocacy of ballot measures is inherently issue advocacy. To import the "express advocacy" standard into laws concerning ballot measures would thus regulate the very speech this Court said could not be regulated.

REV. STAT. § 1-45-111.5(1.5)(a) (2009). This private enforcement provision (which is commonplace in state laws regulating campaign finance) renders Respondent's assurances unpersuasive. Because the statute gives individuals – themselves often interested in the outcome of an election – the power to saddle their opponents with the cost of defending a complaint, the Institute's experience during the Referenda C and D election will most assuredly be repeated. *See Davis v. Fed. Election Comm'n,* 128 S. Ct. 2759, 2767-70 (2008) (rejecting justiciability objections to a suit challenging a campaign finance law that had already been applied to the plaintiff and was likely to be applied again).

Citizens should not be required to resort to predicting the future in order to exercise their First Amendment rights. Petitioner speaks out about ballot issues during virtually every election cycle. App. 167. Under the vague definition of "issue committee," Petitioner and other groups like it are unable to know in advance whether they must register as an issue committee and comply with burdensome regulations, including the requirement of disclosing contributions and expenditures. The constant threat of enforcement and penalties for violating the law demonstrates both the chilling effect of speech regulations and the vitality of the controversy between Petitioner and Respondent. After its previous experience with this statute and its longstanding activities, it is clear that Petitioner possesses "an actual and well-founded fear that the law will be enforced against [it]" in the

future. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

IV. CONCLUSION.

For these reasons, and the reasons stated in the petition, Petitioner Independence Institute respectfully requests that this Court grant its petition for certiorari.

Respectfully submitted,

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